STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 99-F-12

Date Issued: August 12, 1999

Requested by: Carol Olson, Department of Human Services

- QUESTIONS PRESENTED -

I.

Whether tribal courts have inherent off-reservation subpoena power over Department of Human Services employees where the department is not a party to the tribal court proceeding.

II.

Whether a tribal court subpoena is an "order or judgment" under Rule 7.2 of the North Dakota Rules of Court concerning state court recognition of tribal court orders.

III.

Whether a subpoena from the Fort Berthold tribal court is an "order" under N.D.C.C. § 27-01-09 concerning state court recognition of orders issued by that tribal court.

IV.

Whether tribal courts fall within either N.D.C.C. ch. 31-03 or Rule 45 of the North Dakota Rules of Civil Procedure, providing means by which foreign courts can obtain evidence from North Dakota residents.

- ATTORNEY GENERAL'S OPINIONS –

I.

Tribal courts do not have inherent off-reservation subpoena power over Department of Human Services employees where the department is not a party to the tribal court proceeding.

II.

A tribal court subpoena is not an "order or judgment" under Rule 7.2 of the North Dakota Rules of Court concerning state court recognition of tribal court orders.

III.

A subpoena from the Fort Berthold tribal court is an "order" under N.D.C.C. § 27-01-09 concerning state court recognition of orders issued by that tribal court.

IV.

Tribal courts probably do not fall within either N.D.C.C. ch. 31-03 or Rule 45 of the North Dakota Rules of Civil Procedure, providing means by which foreign courts can obtain evidence from North Dakota residents.

- ANALYSES –

I.

Tribal courts adjudicate an array of civil and criminal matters and on occasion the Department of Human Services (DHS) may have information useful to their resolution. As a result, attorneys before tribal courts have served subpoenas upon DHS employees even though DHS is not a party to the action. At times tribal judges themselves have directed subpoenas to DHS employees.

DHS offices are located and DHS employees perform most of their responsibilities beyond reservation boundaries. Thus, tribal court subpoenas directed to DHS employees are rarely served within the reservations.

Tribal courts do not have powers greater than tribes themselves, and tribal sovereignty is not unlimited. It has been diminished. United States v. Wheeler, 435 U.S. 313, 323 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978) citing Johnson v. M'Intosh, 8 Wheat. 543, 574 (1823). Tribes have "the limited powers of a quasi-sovereign." Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz, 691 F.2d 878, 880 (9th Cir. 1982).

Two restrictions on tribal sovereignty directly affect tribal court subpoena powers. The first limits tribal authority to the reservation and the second limits it to tribal members.

There is a significant geographic limitation to tribal jurisdiction. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 142 (1981); White Mt. Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980). It is restricted to reservation boundaries. Felix S. Cohen's Handbook of

Federal Indian Law 332 (R. Strickland ed. 1982). This geographic limitation is a fundamental principle of tribal authority traceable back to 1832. Nevada v. Hicks, 944 F.Supp. 1455, 1463 (D. Nev. 1996), appeal docketed, No. 96-17315 (9th Cir. Dec. 20, 1996).

Indeed, the "limited authority" of a tribe over nonmembers does not even arise until the nonmember enters tribal lands or conducts business with the tribe. Merrion, 455 U.S. at 142. See also Brendale v. Yakima Indian Nation, 492 U.S. 408, 457 (1989)(Blackmum, J., dissenting)("The Court has affirmed and reaffirmed that tribal sovereignty is in large part geographically determined"); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 166 (1980)(Brennan, J., dissenting) (same).[1]

Tribal court subpoenas are subject to the territorial limitations on tribal power. Subpoenas are not a limited, inconsequential expression of a tribe's governmental power. "When compulsory process is served . . . the act of service itself constitutes an exercise of one nation's sovereignty within the territory of another sovereign." Fed. Trade Comm'n v. Compagnie De Saint-Gobin-Pont-A-Mousson, 636 F.2d 1300, 1313 (D.D.C. 1980). Furthermore, a subpoena is an order. It is a command to appear and give testimony that carries with it a penalty for disobedience. Silverman v. Berkson, 661 A.2d 1266, 1271 (N.J. 1995).

This territorial limitation is not unique in American jurisprudence. As a general rule, state court subpoenas do not have extraterritorial effect. "[T]he states uniformly and steadfastly have refrained from exercising extraterritorial subpoena power." Rhonda Wasserman, "The Subpoena Power: Pennoyer's Last Vestige," 74 Minn. L. Rev. 37, 39 (1989). "In the absence of an interstate compact, compulsory process cannot extend beyond the territory of the state, and a state court cannot require the attendance of a witness who is a nonresident of, and is absent from, the state." 81 Am.Jur.2d Witnesses § 15 (1992). See also 97 C.J.S. Witnesses § 17 (1957); Atlantic Comm'l Dev. Corp. v. Boyles, 732 P.2d 1360, 1363 (Nev. 1987)("under traditional notions of power and jurisdiction" an out-of-state court's subpoena directed to a non-party located in Nevada is invalid); People v. Cavanaugh, 444 P.2d 110, 112 (Cal. 1968)("the compulsory process of a court

[1] Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974), however, is an example of tribal jurisdiction extending beyond the reservation. The court allowed a tribe to regulate off-reservation fishing by tribal members.

ordinarily runs only to those persons who can be located within its jurisdiction"); 8 Wigmore on Evidence 89 (1961).[2]

In sum, the territoriality principle of tribal sovereignty limits tribal subpoenas to the reservation. While this geographic restriction sufficiently addresses the ability of tribal courts to issue off-reservation subpoenas, another limitation also applies.

The Supreme Court has often considered the scope of tribal jurisdiction over nonmembers. The general rule is that tribal power is membership-based and does not extend to nonmembers, even those found on the reservation. This limited tribal power over non-Indians was noted long ago. Fletcher v. Peck, 10 U.S. 87, 147 (1810). Modern decisions regularly reaffirm the restriction.

There is a "long line of cases exploring the very narrow powers reserved to tribes over the conduct of non-Indians within their reservations." County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 267 (1992). Indeed, it is a "general principle" that the inherent sovereign powers of a tribe do not extend to nonmembers. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 425-26, 430 (1989). The Court in Montana v. United States, 450 U.S. 544, 565 (1981), referred to this limitation on tribal sovereignty to be the "general proposition." After Montana, tribal sovereignty over nonmembers "'cannot survive'" without express congressional delegation. South Dakota v. Bourland, 508 U.S. 679, 695 n. 15 (1993).[3]

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[2] The territorial limitation to the subpoena power is not, however, absolute. For example, courts retain jurisdiction over their residents who may be absent from the state as well as persons over which the court has acquired personal jurisdiction. Milliken v. Meyer, 311 U.S. 457 (1940); Blackmer v. United States, 284 U.S. 421 (1932); In re Special Investigation 219, 445 A.2d 1081 (Ct. App. Md. 1982). In addition, there has also been some weakening of the doctrine. In New Jersey state administrative subpoenas can have extraterritorial effect. Silverman v. Berkson, 661 A.2d 1266, 1272-74 (N.J. 1995). Scholars have also argued that judicial subpoenas should have extraterritorial effect. Rhonda Wasserman, "The Subpoena Power: Pennoyer's Last Vestige" 74 Minn. L. Rev. 37, 136-46 (1989).

[3] An instance in which Congress has expanded tribal court jurisdiction is with 18 U.S.C. § 2265. It requires that protection orders of state and tribal courts are to be enforced by the courts of another state or tribe. I have held that this federal law pre-empts any contrary state law and, therefore, tribal court protection orders

Thus, tribal authority over nonmembers exists "only in limited circumstances." Strate v. A-1 Contractors, 520 U.S. 438, ___, 117 S.Ct. 1404, 1409 (1997). I am unaware of any authority expanding this limited tribal power to allow tribal courts to issue subpoenas to nonmembers off the reservation.

In Montana the Court did set forth two possible exceptions to the general proposition that tribes cannot regulate nonmembers. Montana, 450 U.S. at 565. These two exceptions also apply to tribal adjudicatory powers. Strate, 520 U.S. at ___, 117 S.Ct. at 1413. The first exception allows a tribe to exercise governmental authority over nonmembers who enter consensual relationships with the tribe or its members. Montana, 450 U.S. at 565. DHS employees performing governmental duties are not engaging in a consensual relationship. They are public officials carrying out statutory duties.

The "consensual relationship" test is restricted to essentially commercial arrangements. Lawrence E. King, "Strate v. A-1 Contractors: A Perspective," 75 N.D. Law Rev. 1, 30 (1999). Indeed, in Lewis County v. Allen, 163 F.3d 509, 515 (9th Cir. 1998), the court stated that the agreement must be "'of the qualifying kind.'" In Lewis County not even a law enforcement agreement between the state and tribe established a "consensual relationship" under Montana. Id. at 514-15.

Montana's second exception allows tribal regulation of non-Indian conduct "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566. It is doubtful that the testimony of a DHS employee in tribal court would directly affect the political integrity, economic security, or the health or welfare of a tribe.

Merely "some" adverse effect is insufficient. The impact must be "demonstrably serious" and must "imperil" the tribe. Brendale, 492 U.S. at 431. The adverse effect must be "'direct'" and must weigh on "'the Tribe as a whole.'" Yellowstone County v. Pease, 96 F.3d 1169, 1176-77 (9th Cir. 1996). The fact that a tribal member's interest or even safety is at issue is insufficient. County of Lewis, 163 F.3d at 515; Wilson v. Marchington, 127 F.3d 805, 814-15 (9th Cir. 1997); Yellowstone County v. Pease, 96 F.3d at 1177. "There is no doubt . . . that the Supreme Court currently interprets tribal self-government narrowly for purposes of the second Montana

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must be given full faith and credit by North Dakota courts. 1995 N.D. Op. Att'y Gen. 45.

exception." Wm. C. Canby, Jr., American Indian Law in a Nutshell 279 (3rd ed. 1998).

Furthermore, the Montana exceptions have been applied to instances in which the nonmember was involved in an on-reservation activity. They may well have no application at all to nonmembers, like DHS employees, who are off the reservation. As the Court has ruled, "a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe." Merrion, 455 U.S. at 142. (Emphasis added.) "Neither Montana nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations." Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1091 (8th Cir. 1998) (emphasis in original).

Because of the restricted jurisdiction tribal courts have over nonmembers, to have off-reservation effect, tribal court subpoenas issued to DHS employees must be allowed by state law. The following three sections of this opinion examine these possibilities.

II.

Rule 7.2(b) of the North Dakota Rules of Court (N.D.R. Ct.) states that "unless objected to" the "judicial orders and judgments of tribal courts" are recognized and have the same effect as state court judgments. If there is an objection then the recognizing court must be satisfied that certain criteria have been met.

At first blush tribal court subpoenas seem to fall within Rule 7.2. The rule applies to "orders" and subpoenas are orders. But other parts of the rule make it apparent that the Supreme Court did not intend it to include subpoenas.

The rule requires, if there is an objection to recognition of a tribal court order, that the state court examine five elements. The content of these elements helps reveal the kind of tribal court orders the Supreme Court had in mind in adopting Rule 7.2.

The state court is to ensure that the order "was obtained without fraud, duress, or coercion" and "through a process that afforded fair notice and a fair hearing." N.D.R. Ct. 7.2(b)(2)(3). Issuing subpoenas is generally an ex parte or unilateral act that rarely raises questions of fraud, duress, and coercion. Furthermore, subpoenas are not issued after notice and hearing.

The recognizing state court is also to determine if the tribal court order is "final." N.D.R. Ct. 7.2(b)(5). This too is a concept foreign to subpoena practice. Subpoenas are not a kind of process that is preliminary, temporary, or conditional, later ripening into something "final."

Thus, at least a majority of the criteria to be examined under Rule 7.2 by the recognizing state court are foreign to subpoenas. This indicates that the Supreme Court did not contemplate subpoenas as a kind of judicial order subject to state court recognition.

Two other aspects of Rule 7.2 support this conclusion. The rule states that judgments "filed for recognition . . . are subject to the notice of filing, stay of enforcement, and fee provisions" of N.D.C.C. §§ 28-20.1-03, 28-20.1-04, and 28-20.1–05. N.D.R. Ct. 7.2(c). These statutes contain references to judgment creditor, judgment debtor, execution of judgments, stays of execution pending appeal, and satisfaction of judgments. Such provisions are unrelated to subpoenas.

Finally, Rule 7.2 provides that tribal court orders and judgments are to "have the same effect and are subject to the same procedures, defenses, and proceedings as judgments of any court of record in this state." N.D.R. Ct. 7.2(b) (emphasis added). Satisfying a subpoena and satisfying a judgment are usually quite different things. This is another indication that the rule does not cover subpoenas.

While the terms of Rule 7.2 alone make it fairly clear that it does not include tribal court subpoenas, this is confirmed by the history of the rule. The note following Rule 7.2 states that its sources are pages 11-13 and 21-22 of the Final Report of the Tribal/State Court Forum and pages 6-9 of the Minutes of a meeting of the Court Services Administration Committee.

The Tribal/State Court Forum was an initiative of the North Dakota Supreme Court to enhance cooperation between tribal and state courts. North Dakota Tribal/State Court Forum, Final Report 1-2 (1993). The Forum held four meetings in 1993 which resulted in the proposal that became Rule 7.2 and the proposal is discussed on pages 11-13 and 21-22 of the Forum's Final Report. Nothing here indicates that subpoenas were intended to be included. Furthermore, nothing in the minutes of the Forum's four meetings indicates that subpoenas were contemplated. Id. at Appendix.

The minutes of the Court Services Administration Committee, however, contain some enlightening comments. Judge Foughty, who chaired the

Tribal/State Court Forum, reviewed the rule for the committee. He referred to the rule as "establishing a minimal recognition of final civil judgments." Minutes Ct. Servs. Admin. Comm. 7 (Mar. 25, 1994) (Statement of Judge D. Foughty). This was intended to be a general description of the rule, and it does exclude subpoenas. Judge Foughty also stated "that the proposed rule does not address such matters as interim orders in domestic cases or criminal warrants." Id. Thus, while the phrase "orders and judgments" is seemingly all-encompassing, it was not intended to be without restriction.

Finally, the tape recording of the Supreme Court's Sept. 13, 1994, hearing on the proposed rule and the written comments submitted to the court were reviewed. There was nothing in either source to indicate that the rule covers subpoenas.

In sum, Rule 7.2's reference to "judicial orders" is broad and could include subpoenas, but a handful of provisions in the rule indicate that it was not intended to do so. Furthermore, nothing in the history of the rule's promulgation supports including subpoenas within its reach.

III.

State courts are to recognize and enforce, under limited circumstances, "any judgment, decree, or order" issued by the Fort Berthold tribal court. N.D.C.C. § 27-01-09. Unlike Rule 7.2, this statute does not contain any terms indicating that it does not extend to subpoenas. Consequently, the plain meaning of the statute's reference to tribal court "orders" includes subpoenas.

The statute, however, is limited. It does not include all tribal court orders, just those that "might be termed 'family law' judgments." Fredericks v. Eide-Kirschmann Ford, Inc., 462 N.W.2d 164, 169 (N.D. 1990). Furthermore, the statute requires reciprocity and any tribal court order for which recognition is sought must have been issued by a judge who is law-trained and licensed. Id. So, while a subpoena issued out of the Fort Berthold tribal court could be enforced by a state court, the circumstances under which this could happen are limited.[4]

IV.

[4] Depending upon the nature of the tribal court order, the restrictions of N.D.C.C. § 27-01-09 may be pre-empted by 18 U.S.C. § 2265. See the discussion in footnote 3.

Because tribal court subpoenas have only a limited off-reservation effect, if tribal courts desire to reach DHS employees with their subpoena power they will have to do so under a state law. In sections II and III, two such possibilities were discussed. Two other state laws require discussion. One is a provision in Rule 45 of the North Dakota Rules of Civil Procedure and the other is the Uniform Act to Secure the Attendance of Witnesses from Without a State in a Criminal Proceeding, which is at N.D.C.C. ch. 31-03.

Rule 45(a)(3) of the Rules of Civil Procedure states:

> A subpoena may be issued by the clerk . . . to an attorney representing a party in a civil action pending in another state upon filing proof of service of notice under subdivision (b)(2), or to a party in a civil action pending in another state upon filing a letter of request from a foreign court.

(Emphasis added). Rule 45 allows a means by which a North Dakota witness can be deposed for an action pending in another state. Even if the witness cannot be required to travel to the other state to testify, his or her deposition, if that state's rules allow, can be used in lieu of live testimony. The question is whether litigants in a North Dakota tribal court could use Rule 45 to get a state court subpoena to depose DHS employees.

Given the Rule's reference to "another state" it is unlikely that litigants in North Dakota tribal courts will be able to use Rule 45 to depose persons residing off the reservation. Tribes are not equivalent to states. They have not been given "state" status under the Interstate Commerce Clause, the Racketeer Influenced and Corrupt Organizations Act, the Employment Retirement Income Security Act, a federal bribery statute, the full faith and credit clause, and certain federal tax statutes. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 191-92 (1989); Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 n. 5 (9th Cir. 1990); Smart v. State Farm Ins. Co., 868 F.2d 929, 936 (7th Cir 1989); United States v. Barquin, 799 F.2d 619, 621 (10th Cir. 1986); Lohnes v. Cloud, 254 N.W.2d 430, 433 (N.D. 1977); Confederated Tribes of the Warm Spring Reservation v. Kurtz, 691 F.2d 878, 880-81 (9th Cir. 1982).

Also, courts have made general statements that while tribes are distinct political entities they are not states. White Mt. Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 186 n. 11 (1980); Seneca Constitutional Rights Org. v. George, 348

F.Supp. 51, 56 (D.C.N.Y. 1972); In re Custody of Sengstock, 477 N.W.2d 310, 314 (Wis. Ct. App. 1991). Rule 45(a)(3) is inapplicable to tribal courts.

North Dakota's version of the Uniform Act to Secure the Attendance of Witnesses from Without a State in a Criminal Proceeding, N.D.C.C. ch. 31-03, also appears inapplicable to tribal courts. The Act provides for cooperation among state courts to ensure that witnesses needed in criminal matters are produced. If a North Dakota court receives a certification from the court of another state, the North Dakota court will notify the prospective witness and hold a hearing. N.D.C.C. § 31-03-25. If the court is satisfied that several factors are met, it will direct the witness to testify in the foreign court. N.D.C.C. § 31-03-26. The statute requires reciprocal legislation. N.D.C.C. § 31-03-25.

While the Uniform Act does not mention tribal courts, Arizona and California have extended their Act to the Navajo Nation, which adopted the Act in 1989. Tracy v. Superior Court, 810 P.2d 1030, 1033 n. 3 (Ariz. 1991); People v. Superior Court, 274 Cal. Rptr. 586, 587-88 (Cal. Ct. App. 1990). The Arizona and California versions of the Act, unlike North Dakota's, define "state" to include "territories," and their courts broadly interpret this term to include tribes. Id. at 590; Tracy, 810 P.2d at 1046, 1051. Other courts, however, have stated that tribes are not "territories." In re Custody of Sengstock, 477 N.W.2d 310, 314 (Wis. Ct. App. 1991).

While the North Dakota Supreme Court has stated that it considers tribes equivalent to foreign nations where necessary to further better relations, Fredericks v. Eide-Kirschmann Ford, Inc., 462 N.W.2d 164, 168 (N.D. 1990), it has described tribes as "hold[ing] a unique legal status as quasi sovereign entities," and stated that tribes do not fall within the Uniform Child Custody Act's reference to the courts of another state. Malaterre v. Malaterre, 293 N.W.2d 139, 144 (N.D. 1980). See also Lohnes v. Cloud, 254 N.W.2d 430, 432 (N.D. 1977) (construing the Unsatisfied Judgment Fund as inapplicable to tribal court judgments). Based on this history, I do not believe the Legislature intended Chapter 31-03 to include tribal courts.

- EFFECT –

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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